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No. 81-105

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JAMES EDWARD BROWN
Petitioner,

-VS-

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S CONVICTION MUST BE REVERSED BECAUSE THE PROSECUTOR INJECTED THE RELIGIOUS BELIEFS OF HIS CHIEF WITNESS IN VIOLATION OF THE CLEAR AND STRICT PROHIBITION OF RULE 610 OF THE FEDERAL RULES OF EVIDENCE.

II. WHETHER PETITIONER WAS DENIED A FAIR TRIAL BECAUSE A POLICE OFFICER DELIBERATELY INFORMED THE JURY THAT PETITIONER HAD A POLICE RECORD AS A KNOWN DRUG DEALER.

III. WHETHER THE PROSECUTOR PREJUDICED THE JURY BY PRESENTING, WITHOUT CONNECTION OR NECESSITY, TESTIMONY WHICH IMPLIED THAT PETITIONER PRESENTED A NEED FOR PROTECTIVE CARE OF HIS CHIEF WITNESS AND FAMILY.

IV. WHETHER PETITIONER WAS DENIED A FAIR TRIAL BY THE CUMULATIVE EFFECT OF THE PROSECUTOR INJECTING RELIGIOUS BELIEFS OF HIS CHIEF WITNESS AND IMPLYING A NEED FOR PROTECTIVE CARE OF HIS CHIEF WITNESS AND A POLICE OFFICER LABELING PETITIONER AS HAVING A POLICE RECORD AS A KNOWN DRUG DEALER.

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Petitioner James Edward Brown respectfully requests that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Fifth Circuit entered in this case on May 20, 1981.

OPINION BELOW

The Per Curiam Order of the Court of Appeals, stamped, "Do Not Publish," is contained in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 20, 1981. This Petition is being filed within sixty (60) days of the above date as required by Rule 20.1 of the Supreme Court Rules. Jurisdiction of this Court is invoked under 28 USC §1254(1).

STATEMENT OF THE CASE

On May 1, 1979, the prosecution filed an indictment against Quentin Morgan Perry, Petitioner James Edward Brown, Omar Ell and James Malcolm Henry in the United States District Court for the Northern District of Georgia in the Atlanta Division (ROAI 1-3).* The indictment charged defendants with conspiracy to possess cocaine with intent to distribute in violation of 21 USC §§846, 841 (a)(1), and alleged six overt acts in furtherance of the charged conspiracy (ROAI 1-3).

On August 7, 1979, the prosecution filed a superseding indictment (ROAI 104-107). The indictment contained the same charge of conspiracy to possess cocaine with intent to distribute, but made amendment to limit the so-called plan and purpose of the charged conspiracy (ROAI 104-107). The indictment also added two John Does as defendants, eliminating Omar Ell as a named defendant (ROAI 104-107). On October 5, 1979, the prosecution filed a second superseding indictment, containing the same charge and defendants and substantially similar allegations (ROAI 116-119).

On February 20, 1980, Petitioner plead not guilty to this indictment and jury trial commenced before District Judge Robert L. Vining, Jr. (ROAI 120, 126).

In its case-in-chief, the prosecution presented nine witnesses (TI 2; TII 2).

The first prosecution witness was Omar Ell (TI 8). At the outset of direct examination, the prosecutor's questioning showed that Omar Ell was 47 years old (TI 9), had a wife and child (TI 9), lived in Atlanta for the last three years (TI 9-10), and owned a merchandising business which distributed Magic Cloth and invented Omar Comb (TI 10).

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* ROAI indicates Record on Appeal, Volume I.
ROAII indicates Record on Appeal, Volume II.
TI and TII indicate trial transcripts Volumes I and II, both of which are contained within the Record on Appeal, Volume II.

Omar Comb was offered and admitted into evidence as Government Exhibit No. 1 (TI 10-11, 14).

The prosecutor's questioning then showed that Omar Ell was indicted along with Petitioner and the others, had negotiated a guilty plea deal and a three year sentence recommendation with the prosecution, and had received a five year sentence (T.I 11-12). A four page guilty plea document was offered and admitted into evidence as Government Exhibit No. 2 (TI 12, 14).

The prosecutor's questioning showed that Omar Ell and his family has been safeguarded in a witness protection program since July, 1979:

> "Q. Were there any other terms and conditions in the negotiated plea agreement?
>
> A. Yes. You promised to safeguard my family and myself.
>
> Q. Mr. Ell, are you presently in what is called the witness protection program?
>
> A. Yes.
>
> Q. Mr. Ell, how long, sir have you been in that program?
>
> A. Since July." (TI 12-13).

The prosecutor's questioning then showed that Omar Ell had been arrested for having a gun in car, which was dismissed, and for having two marijuana cigarettes, which resulted in a fine (TI 15).

Lastly, the prosecutor's questioning showed that Omar Ell had legally changed his name in 1978:

> "Q. All right, have you ever used any other name other than Omar Ell?
>
> A. The name I was given to at birth.

Q. What was that name?

A. William O'Key.

Q. When and how did you change your name?

A. Changed my name in 1978 here in Atlanta.

Q. How did you go about that?

A. Through the Court." (T.I 15-16).

The prosecutor's questioning went one step further to show that Omar Ell changed his name because of religious beliefs:

"Q. Was there any reason for your decision to change your name?

A. Yes.

Q. What was that reason, please, sir?

A. I'm Moslem by faith." (TI 16).

The prosecutor then began to question Omar Ell about the case (TI 16).

On cross-examination, Ell could not remember the exact date on which he changed his name (TI 50). Ell could not remember the name of the person who filed his petition for a name change (TI 51). Ell testified that the person was a boutique shop owner (TI 51). Ell could not remember the name of the judge who granted him a name change (TI 52). Neither Ell nor the prosecutor could account for the whereabouts of the court document certifying the name change (TI 51-52).

In response to questions by defense counsel, Ell reaffirmed his religious beliefs:

"Q. And I believe you changed because of the religious preference?

A. That is correct.

Q. And you were firm about the religious preferences?

A. I still am." (TI 52)

* * *

"Q. What religion was that?

A. I am moslem, Moorish American Moslem.

Q. Is that like the Ayatollah?

A. I don't know what you mean.

Q. Ayatolla is Moslem?

A. There are several sects of Moslems. The Moorish is a sector of Moslems. No, it is not like the Ayatollah.

Q. You study the Holy Koran?

A. Right.

Q. You call the Supreme Being, Allah?

A. I call him Allah. I call him God. I call him Jehovah.

Q. And that is the reason you changed your name?

A. Because I am Moslem.

Q. And you are still Moslem?

A. Yes.

Q. They have a strong belief and favor of telling the truth?

A. One of the five pillars is truth.

Q. Sir?

A. Yes. Moslems do tell the truth all the time to the best of their ability and knowledge.

Q. And you are Moslem?

A. Yes, sir.

Q. And you tell the truth?

A. That's the only thing I have told." (TI 55-56).

The seventh prosecution witness was Sylvester Chapman (TII 85). Sylvester Chapman testified that he was a narcotics officer with the Detroit Police Department (TII 85-86). Officer Chapman testified that on December 15, 1977, he went to a bar in Detroit to buy cocaine on information from Willie Harris (TII 86). Officer Chapman went into the bar with Officer Sheriyn Fleming and other officers stood surveillance outside the bar (TII 87). Officers Chapman and Fleming met Harris and Harris introduced them to Omar Ell (TII 88). Ell said that he had only five ounces of cocaine to sell (TII 89). Chapman said that he was prepared to buy a pound and told Ell that he wanted to check out a sample (TII 89). Ell sold Chapman a quarter ounce of cocaine for $500 (TII 90).

Officer Chapman testified that on the following day, he received a call from Harris indicating Ell and his partner wanted to meet with him regarding a pound of cocaine (TII 94-95). Officers Chapman and Fleming met Ell and James Henry at the bar (TII 95-96). Chapman, Harris, Ell and Henry went to the basement of the bar to talk (TII 96-97). Henry said that he had four or five ounces of cocaine to sell and showed Chapman a solid piece of cocaine (TII 97). Chapman told Henry that he only had enough money to buy two ounces (TII 97). Chapman testified that he did not make a buy, but did make arrangements to buy a pound of cocaine within a week (TII 97-98). Officer Chapman testified that he was given a telephone number which turned out to be Petitioner's number (TII 91-92, 100).

On cross-examination, defense counsel showed that Petitioner was not involved in or mentioned during the sale of cocaine by Ell to Chapman on December 15, 1977 (TII

115-119). Defense counsel also showed that Petitioner was not involved in or mentioned during the proposed sale of a pound of cocaine among Henry, Ell and Chapman on December 16, 1977 (TII 119-122). Officer Chapman testified that he had information about Henry leaving Detroit on December 17, 1977, contradicting Ell's testimony (TII 17-19).

Defense counsel then asked Officer Chapman whether Harris had introduced him to Petitioner and Officer Chapman answered in the affirmative but said an explanation was needed:

> "Q. Mr. Harris, the man who was giving other information as to other known narcotic traffickers that he knew gave you Mr. Brown's—introduced you to Mr. Brown?
>
> A. That's correct. But I need an explanation." (TII 126)

Defense counsel repeated his question a couple of more times and then allowed Officer Chapman to explain. Officer Chapman proceeded to testify that Petitioner had a police record as a known drug dealer:

> "Q. Now, you can explain.
>
> A. Mr. Brown was a known drug dealer.
>
> Q. Known by whom?
>
> A. Know to me and the police department. In the files as a record.
>
> Q. Don't you mean you suspected him?
>
> A. No.
>
> Q. He didn't have a case pending?
>
> A. No.
>
> Q. He was a drug dealing suspect?

A. No. He had a record.

Q. He has a record?

A. There was a record of James Brown that we had.

Q. Did he have a record of being convicted of selling narcotics?

A. I can't recall. It was the first time that—around this time that I received information then that James Brown had brought the pound I had offered up from Mr. Ell." (TII 126-127).

After the prosecution rested (TII 146), the defense chose to call no witnesses (TII 146).

Following argument by the prosecution and defense (TII 148) and instructions by the judge (TII 149-169), the jury returned a verdict of guilty as charged to Count I (TII 169-170).

On May 29, 1980, Petitioner was sentenced to eight years in prison to be following by four years on special parole (ROAI 127). Petitioner's pretrial bond was also continued pending appeal (ROAI 127).

On July 1, 1980, Notice of Appeal was filed (ROAI 128-133).

On August 27, 1980, Judge Vining, on his own motion and pursuant to Rule 32 of the Federal Rules of Criminal Procedure, ordered that Petitioner's sentence be corrected by elimination of the special parole term (ROAI 134).

On May 20, 1981, the United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction and sentence in an unpublished, per curiam order (Appendix p. 1).

Petitioner now seeks a Writ of Certiorari.

REASONS FOR ALLOWANCE OF WRIT

I. PETITIONER'S CONVICTION MUST BE REVERSED BECAUSE THE PROSECUTOR INJECTED THE RELIGIOUS BELIEFS OF HIS CHIEF WITNESS IN VIOLATION OF THE CLEAR AND STRICT PROHIBITION OF RULE 610 OF THE FEDERAL RULES OF EVIDENCE.

This case involves a court of appeals decision which is in apparent conflict with a clear and strict rule of evidence, and presents an important question on which there is very little case law.

Omar Ell was an indicted defendant who became a prosecution witness in exchange for a plea and sentence deal (TI 11-14). The record clearly shows that Omar Ell was the chief prosecution witness regarding the charged conspiracy (TI 8-TII 38).

Ell was the first witness called to testify for the prosecution (TI 8). At the outset of direct examination, the prosecutor's questioning carefully showed that Ell was 47 years old (T 9), had a wife and child (TI 9), lived in Atlanta for the last three years (TI 9-10), and owned a merchandising business which distributed Magic Cloth and invented Omar Comb (TI 10). Omar Comb was even offered and admitted into evidence as Government Exhibit No. 1 (TI 10-11, 14).

The prosecutor's questioning then got to the business of establishing Ell's plea and sentence deal (TI 11-14) and his prior criminal record—which only consisted of a dismissed gun charge and a fine for possession of two marijuana cigarettes (TI 14-15).

Having disposed of these background and preliminary points, it would have appeared that the prosecutor was ready to get to substantive matters. Not so. The prosecutor's questioning took a quick detour to show that Ell had legally changed his name in 1978:

"Q. All right. Have you ever used any other name other than Omar Ell?

A. The name I was given at birth.

Q. What name was that?

Q. William O'Key.

Q. When and how did you change your name?

A. Changed my name in 1978 here in Atlanta.

Q. How did you go about that?

A. Through the Court." (TI 15-16).

The detour did not end here and the reason for the detour soon became apparent as the prosecutor showed that Ell had changed his name because of religious beliefs:

"Q. Was there any reason for your decision to change your name?

A. Yes.

Q. What was that reason, please, sir?

A. I'm Moslem by faith." (T. 16)

No great amount of explanation is necessary to see that the prosecutor was attempting to bolster the credibility of Ell by showing the jury that Ell was religious enough to change the name given to him by his parents at birth. Likewise, little effort is required to understand why the prosecutor wanted to show the jury that Ell was devoted to his religious beliefs. The subtle but clear implication was that a person who is devoted to his religious beliefs is more apt to speak the truth.

The most credible witness is a person with an unimpeachable background and no inducement for testifying. However, there is undeniably a great amount of appeal to an admitted wrongdoer who has strong religious

beliefs and wants to make a clean breast of matters. Since Ell was not the former type of witness, the prosecutor injected religious beliefs to portray him as the latter type. This tactic could not have failed to strike a responsive chord with the jury.

Rule 610 of the Federal Rules of Evidence clearly and strictly prohibits the use of evidence regarding religious beliefs or opinions to impair or enhance credibility:

> "Rule 610. Religious Beliefs or Opinions
>
> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced."

There is very little federal case law regarding Rule 610. This is perhaps due to the fact that the bench and bar have assumed that Rule 610 means exactly what it says. See, *State* v *Estabrook*, 162 Or 476; 91 P2d 838, 849 (1939). Nevertheless, instances occurred in *Virgin Island* v *Petersen*, 553 F2d 324 (3rd Cir, 1977) and *United States* v *Sampol*, 636 F2d 621 (DC Cir, 1980).

In *Virgin Island* v *Petersen*, *supra* at 325, 328, defendant was convicted of two counts of murder in the second degree. On appeal, defendant maintained that the district judge erred by refusing to admit opinion evidence regarding non-violence. The record showed that defense counsel attempted to present through the testimony of an alibi witness that the witness and defendant were Rastafarians and that Rastafarians do not believe in violence.

The Third Circuit rejected defense counsel's contention that the testimony was any sort of opinion evidence, and found that the testimony involved religious affiliation and beliefs:

> "We cannot agree with counsel that this was an inartful attempt to elicit an opinion as to defendant's

> peacable character. The colloquy at side bar clearly reveals that counsel sought to put before the jury the religious affiliation and belief of both Rios and Petersen." *Virgin Island* v *Petersen, supra* at 328.

The Third Circuit went on to indicate that the religious affiliation of the alibi witness was clearly prohibited by Rule 610. *Virgin Island* v *Peterson, supra* at 328.

In *United States* v *Sampol, supra* at 629, defendants were convicted of various offenses arising out of the assassination of a former foreign ambassador and an American associate. On appeal, defendants' maintained that the district judge erred in refusing to allow cross-examination regarding religious beliefs of a prosecution witness who admitted aiding one defendant and implicated the same defendant in the assassination. *United States* v *Sampol, supra* at 666. The district judge had permitted voir dire of the witness regarding his religious beliefs and then cut off all further inquiry upon learning that the witness had no religious beliefs which would cause him to violate his oath to testify truthfully. *United States* v. *Sampol, supra* at 666.

The District of Columbia Circuit rejected defendants' contention, indicating that the district judge's limiting of cross-examination was not only justified but required by Rule 610 of the Federal Rules of Evidence:

> " . . . the court's exclusion of this evidence was not only justified but required by the Federal Rules of Evidence. Rule 610 bars the admission of evidence of the religious beliefs of a witness for the purpose of showing that his credibility is impaired as a result of those beliefs." *United States* v *Sampol, supra* at 666. (Footnote omitted)

The District of Columbia Circuit went on to state:

> "The purpose of the rule is to guard against the prejudice which may result from disclosure of a witness's faith." *United States* v *Sampol, supra* at 666.

Conversely, the purpose of Rule 610 is to guard against enhancing the credibility of a witness by showing devotion to his faith.

In this case, this Court should reject to prosecutor's pat contention that he was just trying to show a reason for the name change by Omar Ell. There was no real need to show a reason for a name change in the first place. The prosecutor obviously knew that Ell had legally changed his name for a legitimate reason, rather than merely assuming an alias for some illegitimate reason. A legal name change for legitimate reasons would also seem to be protected from inquiry or attack in a totally unrelated proceeding. Even if the prosecutor feared that defense counsel might somehow make hay of the name change, he could have and should have avoided any problems by bringing the matter to the attention of the district judge in the absence of the jury. See, *United States* v *Rabb*, 394 F2d 230, 233 (3rd Cir, 1968). Instead, the prosecutor injected the religious affiliation and belief of his chief witness into the case without prior notice or due cause.

Defense counsel did not object to the testimony, and the district judge did not take any action to exclude the testimony or caution the jury (TI 15-16). Moreover, defense counsel unsuccessfully attempted to undercut the religious beliefs of Omar Ell during cross-examination, and again the district judge did not take any action to exclude the testimony or caution the jury (TI 52, 55-56).

Thus, the Court is faced with a situation in which the prosecutor injected religious beliefs of his chief witness; defense counsel did not object and unsuccessfully attempted to undermine the religious beliefs of the witness; and the district judge did not take any action to eliminate or mitigate the error—all to the detriment of Petitioner.

The fact that defense counsel did not object does not preclude review of this serious error. Rule 610 is so basic in its principle and so clear on its face that an objection is not

really needed to bring a violation to the attention of the district judge. It also appears that no federal case strictly requires an objection.

Most modern state cases have strictly held that injection of religious belief on the issue of credibility is error. See generally, Annot., Impeachment of Witnesses-Religious Belief, 76 ALR3d 539, 543. In *O'Donnell* v *Philadelphia Record Co*, 356 Pa 307; 51 A2d 775; 793-794, n 5 (1947), Chief Judge Maxey of the Philadelphia Supreme Court indicated in dissent that upon a question and answer regarding religious affiliation, "the trial judge should have immediately declared a mistrial." Similarly, in *State* v *Duke*, 362 SO2d 559, 560-561 (La, 1978), the Supreme Court of Louisiana indicated that the trial judge is obliged to control testimony and exclude irrelevant matters, especially religious beliefs:

> "Our criminal justice system is built upon the principle that a conviction is based upon actual guilt of the conduct charged. For that reason, the trial judge must fairly control the introduction of evidence to avoid infecting a jury trial with the prejudicial influence of irrelevant matters, especially the religious beliefs, the political ideology, and the societal views . . ." [Citation omitted]

While *State* v *Duke, supra* at SO2d 561 is distinguishable by the fact that the prosecutor asked many more questions about religious beliefs, extensive questioning is not necessarily required for reversal. In *People* v *Hall*, 391 Mich 175; 215 NW2d 166 (1974), the prosecutor asked defendant, without objection, the following question:

> "PROSECUTOR: I forgot to ask you, Mr. Hall, whether or not you believe in the Supreme Being?"

The Michigan Supreme Court held that the asking of the question was plain error:

> "The constitution and our Legislature have forbidden that questions, of the nature with which we are here presented, be asked during the course of a criminal proceeding. The asking of such question is clear error." *People* v *Hall, supra* at Mich 182.

In *People* v *Brocato*, 17 Mich App 277, 298 (1969), the prosecutor opened his cross-examination of defendant, without objection, as follows:

> "Q. You do believe in God?
>
> A. Oh, yes.
>
> Q. So that there is no question about the oath you have taken here?
>
> A. Oh, no."

The Michigan Court of Appeals tersely held that the prosecutor's questions were "highly improper." *People* v *Brocato, supra* at Mich App 298. Accord, *People* v *Williams*, 39 Mich App 458, 459-462; 197 NW2d 858 (1972); *People* v *Killingworth*, 80 Mich App 45, 54; 263 NW2d 278 (1977).

On the other hand, in *People* v *Wells*, 82 Mich App 543, 545; 265 NW2d 410 (1978), the prosecutor asked the complainant, without objection, the following questions:

> "Q. Do you go to church, by the way?
>
> A. Yes.
>
> Q. What church?
>
> A. Christ The Good Shepherd.
>
> Q. Would it be fair to say, then, that you know what it is to take an oath?

A. Yes.

Q. Do you respect that oath?

A. Yes."

The Michigan Court of Appeals found that the prosecutor's questions constituted an unfair attempt to bolster the credibility of the complainant and held there was reversible error.

> "We cannot help but find that the prosecutor, in asking the questions that he did, was attempting to unfairly bolster complainant's credibility. We believe such conduct to be totally unwarranted and the type of influence condemned . . .
>
> In essence it appears the prosecutor was attempting to convey to the jury that complainant was more worthy of belief than defendant because she attended church, knew what it was to take an oath and respected that oath because of her church attendance. Hence, implicit in the questions and answers was a conveyance to the jury that complainant had certain religious beliefs and because of such beliefs she knew what it was to tell the truth.
>
> In a case such as this, when the crucial issue is that of credibility, such questions by a prosecutor put to a complaining witness are unwarranted, prejudicial and constitute reversible error. Nor does defendant's failure to object to such questions save the error." *People* v *Wells, supra* at Mich App 546, [Citation omitted]

The rationale for not requiring extensive or direct questioning on religious beliefs is simply that religious beliefs can be just as effectively injected by few questions or by indirect questions.

The rationale for not requiring an objection for reversal was aptly stated by the Michigan Supreme Court:

> "The state argues, and it was so held by the Court of Appeals, that since no objection to the question appears on the record, and since 'manifest injustice' was not shown, this type of error does not require reversal. We disagree. *If we were, on a case by case basis, to evaluate the entire record to determine if prejudice or manifest injustice occurred therein because of this type of question, we would emasculate our statute and the legislative intent behind it.* * * * This Court feels that it is inappropriate for it to take it upon itself to determine whether or not such prejudicial reaction did in fact occur, when our statute clearly attempts to foreclose such review by forbidding the asking of the prejudicial question itself. A defendant is entitled to a trial free from such improper questions. Once the question is asked, this is no longer possible. A new trial is mandated." *People* v *Hall, supra* at Mich 182-183. (Emphasis added)

This Court should adopt these rationales and apply them to reverse Petitioner's conviction because Rule 610 clearly and strictly prohibits the use of religious beliefs—regardless of the excuse by the prosecutor or the reaction by defense counsel.

II. PETITIONER WAS DENIED A FAIR TRIAL BECAUSE THE OFFICER DELIBERATELY INFORMED THE JURY THAT PETITIONER HAD A POLICE RECORD AS A KNOWN DRUG DEALER.

The volunteering by police officers of inadmissible and prejudicial testimony has been condemned time and time again by both state and federal courts. In *Wright* v *State*, 325 P2d 1089, 1093 (Okla, 1958), the Court noted that this

tactic has often been referred to as an "evidential harpoon":

> "This type of testimony has often been referred to as an 'evidential harpoon' that has been wilfully jabbed into the defendant and then jerked out by an admonition to the jury not to consider the same. This court has never condoned, but often critized a witness being intoxicated with eagerness in an all out effort to obtain a conviction. * * * Officers must be aware that an overzealous attitude is, in most instances, detrimental to the prosecution and often results in retrial of the case at considerable expense to the state."

Wright v *State, supra,* was cited with approval in *Gregory* v *United States,* 369 F2d 185, 190 (DC Cir, 1966).

In this case, Petitioner was a by-stander victim of an evidential harpoon. Petitioner chose not to testify (TII 146) and his prior criminal record was not admissible. *Michelson* v *United States,* 335 US 469, 475-476; 69 S Ct 213; 93 L Ed 168 (1948). Nevertheless, Detroit Police Officer Sylvester Chapman created an opportunity to inform the jury that Petitioner had a police record as a known drug dealer.

During cross-examination of Officer Chapman, defense counsel showed that Officer Chapman was first told about the possibility of buying narcotics by informant Willie Harris; that Willie Harris introduced him to Omar Ell; that he met with Omar Ell and James Henry the next day; and that Petitioner was not present or mentioned during either meeting (TII 124-125). Defense counsel then asked Officer Chapman whether Willie Harris had introduced him to Petitioner. Officer Chapman answered in the affirmative, but said an explanation was needed:

> "Q. Mr. Harris, the man who was giving other information as to other known narcotic traffickers that he knew gave you Mr. Brown's—introduced you to Mr. Brown?

A. That's correct. But I need an explanation." (TII 126)

Defense counsel repeated his question a couple of times and then allowed Officer Chapman to explain. Officer Chapman proceeded to testify that Petitioner had a police record as a known drug dealer:

"Q. Now, you can explain.

A. Mr. Brown was a known drug dealer.

Q. Known by whom?

A. Known to me and the police department. In the files as a record.

Q. Don't you mean you suspected him?

A. No.

Q. He didn't have a case pending?

A. No.

Q. He was a drug dealing suspect?

A. No. He had a record.

Q. He has a record?

A. There was a record of James Brown that we had.

Q. Did he have a record of being convicted of selling narcotics?

A. I can't recall. It was the first time that—around this time that I received information that James Brown had brought a pound I had ordered up from Mr. Ell." (TII 126-127).

Officer Chapman's less than subtle desire and success in revealing this inadmissible and highly prejudicial testimony to the jury warrants reversal.

In *United States* v *Vosper*, 493 F2d 433, 435, 437-438 (5th Cir, 1974), defendant was convicted of conspiracy to commit bank robbery and bank robbery. On appeal, defendant maintained that an FBI agent volunteered inadmissible and prejudicial testimony. In the prosecution case-in-chief, the FBI agent testified that he saw defendant and co-defendant at a house which he had under surveillance some weeks prior to the charged bank robbery. In response to a question termed "unnecessary," the FBI agent testified that the house was under surveillance because he had received information that a man living there was involved in the planning of other bank robberies. At this point, the trial judge cautioned the jury not to consider the reason for surveillance or any other bank robberies or anything else.

The Fifth Circuit first noted that a clear cautionary instruction generally eliminates reversible error, but went on to reverse because "the error was gross and harm inescapable." *United States* v *Vosper, supra* at 438. The Fifth Circuit concluded that the FBI agent's testimony was likely "a spur of the moment decision for which time and reflection offered no adequate justification." *United States* v *Vosper, supra* at 438-439.

In this case, Officer Chapman's testimony was not "a spur of the moment decision." Officer Chapman clearly stated that he "needed an explanation," waited, and then unloaded. While hindsight indicates that defense counsel should not have allowed Officer Chapman to explain, a witness's request to explain cannot always be ignored or avoided with impunity in front of a jury. Nonetheless, the question in no way justified the damage done by the response.

Defense counsel's failure to object is understandable under these circumstances and does not preclude reversal according to *United States* v *Vosper, supra* at 437-438. Moreover, the district judge in this case did not exclude the testimony or caution the jury as in *United States* v *Vosper,*

supra at 438. Even if the district judge had taken action, there is certain evidence which a jury just cannot ignore. This case involved such evidence. Officer Chapman's testimony did not refer to a specific offense or conviction, but rather labeled Petitioner as having a police record as a known drug dealer. See, *Helton* v *United States*, 221 F2d 338, 340 (5th Cir, 1955). Such an encompassing label is much more prejudicial than a specific allegation or offense.

Since Officer Chapman deliberately informed the jury that Petitioner had a police record as a known drug dealer, plain error was committed and reversal is required.

III. THE PROSECUTOR PREJUDICED THE JURY BY PRESENTING, WITHOUT CONNECTION OR NECESSITY, TESTIMONY WHICH IMPLIED THAT PETITIONER PRESENTED A NEED FOR PROTECTIVE CARE OF HIS CHIEF WITNESS AND FAMILY.

Evidence of threats to, or intimidation of, prosecution witnesses is highly prejudicial and cannot be properly admitted without some testimony connecting defendant to the threats or intimidation. *United States* v *Sprengel*, 103 F2d 876, 881 (3rd Cir, 1936); *People* v *Salsbury*, 103 Mich 537, 569-570; 96 NW 936 (1903). See, *United States* v *DeCicco*, 435 F2d 478, 481 (2nd Cir, 1970); McCormick on Evidence (2nd ed), §273, p 660.

Near the outset of direct examination, the prosecutor showed that Omar Ell and his family had been safeguarded in the witness protection program since July, 1979:

"Q. Were any other terms and conditions in the negotiated plea agreement?

A. Yes. You promised to safeguard my family and myself.

Q. Mr. Ell, are you presently in what is called the witness protection program?

A. Yes.

Q. Mr. Ell, how long, sir, have you been in that program?

A. Since July." (TI 12-13)

The prosecutor did not show that Petitioner or any co-defendants were connected to threats, intimidation or the reason for protective case. The prosecutor simply showed the jury that his chief witness was under protective care and let the jury infer whatever they wanted from this testimony.

In *United States* v *Archbold-Newball*, 554 F2d 665, 680 (5th Cir, 1977), the Fifth Circuit pointed out "[s]uch testimony necessarily implied that protection was required because the appellants or their cohorts might seek revenge against the witnesses." Testimony implying threats, intimidation, revenge, or what-have-you is highly prejudicial because it not only shows a consciousness of guilt, but also the commission of another crime.

There was no need to present this testimony to the jury. Compare, *United States* v *Archbold-Newball, supra* at 680; *United States* v *Shultz*, 482 F2d 1179, 1182-1183 (5th Cir, 1973). If the prosecutor felt obliged to introduce this testimony under disclosure of the plea and sentence agreement, he could have brought it to the attention of defense counsel and the district judge in the absence of the jury instead of acting first and making excuses later.

Because there was no connection or necessity for this testimony, this was a situation "where the minute peg of relevancy [was] entirely obscured by the dirty linen being hung upon it." *Lucero* v *Donovan*, 352 F2d 16, 22, n 6 (9th Cir, 1966).

Defense counsel's failure to object does not preclude review because of the highly prejudicial nature of testimony implying the need for protective care.

Since the jury was given testimony to infer or even speculate that Petitioner presented a need for protective care of the chief prosecution witness, reversal is required.

IV. PETITIONER WAS DENIED A FAIR TRIAL BY THE CUMULATIVE EFFECT OF THE PROSECUTOR INJECTING THE RELIGIOUS BELIEFS OF HIS CHIEF WITNESS AND IMPLYING A NEED FOR PROTECTIVE CARE OF HIS CHIEF WITNESS, AND A POLICE OFFICER LABELING PETITIONER AS HAVING A RECORD AS A KNOWN DRUG DEALER.

Should this Court decide that the foregoing three issues do not individually warrant reversal, the cumulative effect should be considered because the jury heard the religious beliefs of the chief prosecution witness and Petitioner labeled as a known drug dealer, along with being free to consider Petitioner presently dangerous due to protective custody of the chief prosecution witness.

All this adds up to, and should be called, reversible error.

CONCLUSION

Because of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JAMES EDWARD BROWN
Petitioner,

-VS-

UNITED STATES OF AMERICA
Respondent.

CERTIFICATE OF SERVICE

DOMNICK J. SORISE, in compliance with Supreme Court Rule 28.4(a) and 28.5(b), does hereby certify that he is to become a member of the Bar of the Supreme Court on July 24, 1981, and that on the 15th day of July, 1981, did deposit in the United States Mail, with postage fully prepaid, three (3) copies of the Petition for Writ of Certiorari addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

DOMNICK J. SORISE

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 80-7679
Summary Calendar

D. C. Docket No. CR-79-00115

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES EDWARD BROWN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia
May 20, 1981

Before RONEY, FRANK M. JOHNSON and HENDER-HENDERSON, *Circuit Judges*

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

ISSUED AS MANDATE:

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[1]See *N.L.R.B.* v. *Amalgamated Clothing Workers of America*, 5 Cir, 1970, 430 F.2d 966.